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In The

Supreme Court of the United States

October Term, 1998

KUMHO TIRE COMPANY, LTD., KUMHO U.S.A., INC. and HERCULES TIRE & RUBBER COMPANY, INC.,

Petitioners,

v.

PATRICK CARMICHAEL, AN INDIVIDUAL AND FATHER AND NEXT OF KIN TO PATRICK CARMICHAEL, JR., A MINOR, LUZVIMINDA CARMICHAEL, AN INDIVIDUAL, MOTHER AND NEXT FRIEND OF CARINA HORN, A MINOR, AND ADMINISTRATRIX OF THE ESTATE OF JANICE HORN, CARINA HORN, A MINOR, LEONA CARMICHAEL, SHAMEELA CARMICHAEL, NATIMAH CARMICHAEL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICUS CURIAE* OF BONA SHIPPING (U.S.), INC., LIBERTY MARITIME CORPORATION, MARINE TRANSPORT LINES, INC., MARITIME OVERSEAS CORPORATION, AND THE OFFSHORE MARINE SERVICE ASSOCIATION IN SUPPORT OF RESPONDENTS

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25 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. District Courts Should Exercise a Robust Gatekeeper Function to Exclude Inappropriate Expert Testimony 5

A. The Special Problems with Expert Testimony 5

1. The Jury's Lack of Expertise 5

2. Mercenary Expert Testimony 6

3. The Expert Witness as a Conduit for Inadmissible Evidence 7

B. The Need for a Robust Gatekeeper Function to Exclude Inappropriate Expert Testimony 9

II. A District Court's Responsibility for Controlling Questionable Expert Testimony Does Not End with the Decision on Admissibility, but Continues During the Remaining Pre-Trial Proceedings, Throughout the Trial, and When Deciding Post-Trial Motions 10

A. The Inadequacy of the Simple Gatekeeper Model for Controlling Questionable Expert Testimony 10

TABLE OF CONTENTS – Continued

Page

B. Alternative Pre-Trial, Trial, and Post-Trial Remedies for Controlling Questionable Expert Testimony 12

1. Summary Judgment 12

2. Appropriate Jury Instructions 13

3. Judgment as a Matter of Law Before Submission of the Case to the Jury (Directed Verdict) 14

4. Judgment as a Matter of Law After Trial (Judgment Notwithstanding the Verdict) .. 15

5. Remittitur 15

6. New Trial 16

C. The Importance of Pre-Trial, Trial, and Post-Trial Remedies at the Admissibility Stage 17

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

In re Air Crash Disaster at New Orleans, 795 F.2d 1230 (CA5 1986) 7

Barris v. Bob's Drag Chutes & Safety Equipment, Inc., 685 F.2d 94 (CA3 1982) 8

Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988) ... 11, 17

Bruton v. United States, 391 U.S. 123 (1968) 14

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) ..... *passim*

Douglass v. Eaton Corp., 956 F.2d 1339 (CA6 1992) 15

E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995) 7

Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923) 2

General Electric Co. v. Joiner, 522 U.S. ___, 118 S.Ct. 512 (1997) 9

Gray v. Maryland, 523 U.S. ___, 118 S.Ct. 1151 (1998) 14

Hamling v. United States, 418 U.S. 87 (1974) 9

Jackson v. Pleasant Grove Health Care Center, 980 F.2d 692 (CA11 1993) 15, 17

Lightening Lube, Inc. v. Witco Corp., 4 F.3d 1153 (CA3 1993) 15

TABLE OF AUTHORITIES – Continued

Page

Marsee v. United States Tobacco Co., 866 F.2d 319 (CA10 1989) 8

Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940) 16

Richardson v. Richardson-Merrell, Inc., 857 F.2d 823 (CA DC 1988), *cert. denied*, 493 U.S. 882 (1989) 15

Schudel v. General Electric Co., 120 F.3d 991 (CA9 1997) 15, 17

Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45 (CA2 1984) 16, 17

Shu-Tao Lin v. McDonnell Douglas Corp., 574 F.Supp. 1407 (S.D.N.Y. 1983), *rev'd*, 742 F.2d 45 (CA2 1984) 16

Strickland v. Owens Corning, 142 F.3d 353 (CA6 1998) 16

Turpin v. Merrell Dow Pharmaceuticals, Inc., 959 F.2d 1349 (CA6), *cert. denied*, 506 U.S. 826 (1992) 13

United States v. Lundy, 809 F.2d 392 (CA7 1987) 8

United States v. Sims, 514 F.2d 147 (CA9), *cert. denied*, 423 U.S. 845 (1975) 8, 13

Vadala v. Teledyne Industries, Inc., 44 F.3d 36 (CA1 1995) 13, 14

STATUTES AND RULES

18 U.S.C. § 201(c)(2) 6

18 U.S.C. § 201(c)(3) 7

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 201(d) 7

FED. R. CIV. P. 50(a) 14

FED. R. CIV. P. 50(b) 15

FED. R. CIV. P. 50(b)(1)(B) 17

FED. R. CIV. P. 50(b)(2)(A) 17

FED. R. CIV. P. 56 13

FED. R. EVID. 103(c) 8

FED. R. EVID. 402 9

FED. R. EVID. 403 9

FED. R. EVID. 702 ..... 3, 5, 6, 12

FED. R. EVID. 703 8

A.B.A. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(C) 7

A.B.A. MODEL RULE OF PROFESSIONAL CONDUCT 3.4(b) 7

OTHER AUTHORITIES:

S. GOODE, O.G. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL (2d ed. 1993) 7

Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113 ..... 4, 7

TABLE OF AUTHORITIES – Continued

Page

Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537 (1994) 13

Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631 (1991) 4

22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5217 (1978) 4

BRIEF *AMICUS CURIAE*

Bona Shipping (U.S.), Inc., Liberty Maritime Corporation, Marine Transport Lines, Inc., Maritime Overseas Corporation, and the Offshore Marine Service Association ("OMSA") respectfully submit this brief as *amici curiae* in support of the respondents.[1]

Petitioners and respondents have given their blanket consent to the filing of all *amicus* briefs in this case, and a copy of their attorneys' letter has been lodged with the Clerk of the Court on the behalf of all *amici*.

INTEREST OF *AMICI CURIAE*

The first four *amici* are corporations that do business in the United States, and thus may be subject to suit in the United States. Each has been a defendant in one or more lawsuits in which a plaintiff has sought to introduce questionable expert testimony, and each reasonably anticipates that it will be in a similar situation in the future. Thus, each has a vital interest both in the admissibility of expert testimony and in the options available to a district court when responding to questionable expert testimony. OMSA is a national trade association representing over eighty owners or operators of marine equipment which supports 90% of the equipment servicing the United States offshore oil and natural gas exploration and development industries. Its goals include encouraging and

[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

promoting the highest standards of safety, training, and environmental protection in the offshore marine transportation service industry.

Although *amici*'s interests might seem to be consistent with petitioners' interests, that is true only in the very narrow sense that *amici* and petitioners all have an interest in ensuring that questionable expert testimony does not improperly influence trials. The district court's application of the four *Daubert* factors may have resulted in the proper exclusion of questionable expert testimony in this particular case, but even if that is true here[2] there is no assurance that this limited analysis would produce the correct result in future cases. *Amici* contend that a broader analysis is more appropriate. Thus, *amici* agree with the Eleventh Circuit's judgment, *i.e.*, that the decision of the district court should be vacated, and that the case should be remanded to the district court for reconsideration.[3]

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[2] Like the Eleventh Circuit, *amici* express no view as to whether the specific expert testimony at issue here should have been admitted into evidence. The district court should decide that issue on remand, applying the analysis suggested here to the facts of this case.

[3] The Eleventh Circuit's opinion does not provide any clear direction for the district court on remand. Although the court of appeals declares that "[t]he district court erred as a matter of law in applying the *Daubert* criteria," 131 F.3d at 1437, Petition ("Pet.") App. A at 10a, the extent of this error is not explained. It would be absurd to suggest that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), would be completely irrelevant on remand. If nothing else, the district court would be bound by *Daubert* to apply Rule 702 rather than the rule of *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923). *Amici* accordingly read the decision below as holding that the district court should not limit its analysis to the four *Daubert* factors, but should instead apply a broader analysis under Rule 702 (that may or may not include some or all of the specific *Daubert* considerations). *Amici* support this conclusion, and urge this Court to provide more detailed guidance – both for the district court on remand and for future courts that will face these issues.

Accordingly, *amici* file this brief urging the Court to affirm the decision below and to provide appropriate guidance along the lines advocated here for the district court to apply on remand.

SUMMARY OF ARGUMENT

District courts have a wide range of options for controlling the problems associated with questionable expert testimony. At the admissibility stage, courts should exercise a robust gatekeeper function. Once evidence is held admissible, however, courts still have an array of pretrial, trial, and post-trial remedies to control the problems. For example, when expert testimony is admitted into evidence but is nevertheless insufficient to allow a reasonable jury to find in the proponent's favor, a court may grant summary judgment or judgment as a matter of law, offer a remittitur, or order a new trial. Courts should use each of these tools in appropriate circumstances. Moreover, their availability is an important consideration in the initial admissibility decision. Indeed, some evidence that lies at the margin of admissibility may be properly admitted because the court has adequate controls (other than exclusion) available.

ARGUMENT

The problematic nature of expert testimony is well recognized. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993) (" 'Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.' ") (quoting Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)); 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5217, at 295 (1978) ("Scientific and technical evidence has great potential for misleading the jury."); Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1114-15 & nn.1-6 (cataloging dissatisfaction with expert testimony going back to 1848).

Methods by which the problems might be addressed are also well known, but unfortunately they are often overlooked. In *Daubert*, the Court focused on the issue of admissibility: When is it appropriate to admit an expert's testimony into evidence? This is an important question, and answering it correctly is an essential part of the solution. But it is still only part of the solution. Once the court has ruled that an expert's testimony is admissible, the trial court must still exercise appropriate pre-trial, trial, and post-trial controls to ensure that questionable or insufficient expert testimony does not improperly affect the litigation process. Not only are these other options important in their own right, their availability is an important consideration in resolving the admissibility question. Part I of this brief focuses on admissibility, while Part II focuses on appropriate pre-trial, trial, and post-trial controls.

I

District Courts Should Exercise a Robust Gatekeeper Function to Exclude Inappropriate Expert Testimony

A. The Special Problems with Expert Testimony

Although expert testimony has the potential to be highly valuable in resolving legal disputes, problems unique to expert testimony also create a tremendous risk that it may be abused. *Amici* note three particular problems with expert testimony, each of which increases the risk that the testimony will be abused.

1. The Jury's Lack of Expertise. The admissibility of expert testimony and the wide latitude given to experts are based on the assumption that jurors lack the expertise to understand the significance of the underlying facts on which experts rely to draw their conclusions. *See, e.g.*, Advisory Committee's Note to FED. R. EVID. 702. Even if jurors were given the underlying facts on which a reliable expert depends, the Rules presume that they would be unable to reach the correct conclusions without assistance.

If jurors had the necessary expertise, expert witnesses could testify in the same way as ordinary lay witnesses. In the context of the present case, for example, Mr. Carlson would simply testify about his observation of such things as "tell-tale markings," " 'bead grooves,' " and " 'sidewall deterioration,' " 131 F.3d at 1436, Pet. App. A at 8a, on the failed tire. The jury would then draw its own conclusion "whether [the] tire failed because of abuse or neglect." *Ibid.* Similarly, in *Daubert* the challenged experts would have described their observations

during the "in vitro" and "in vivo" animal studies, the observations during the pharmacological studies, and the data in the previously-published pharmacological studies. *See* 509 U.S. at 583. The jury would then apply this knowledge itself to determine whether Bendectin causes birth defects in humans.

Because jurors are presumed to lack the expertise to draw useful conclusions from any technical or scientific data, Rule 702 permits reliable experts to draw the conclusions for the jury. So long as the experts are reliable, the system can work well and jurors can obtain valuable information that will help them to reach a correct verdict. When the experts' opinions are unreliable, however, the jury – by the same hypothesis that permits the experts' testimony – lacks the expertise to recognize the invalidity of their conclusions, and accordingly it may easily be misled or confused as a result. Having set up a system based on the assumption that jurors will not understand an expert's methods, it makes little sense to ask jurors to distinguish between reliable and unreliable expert testimony based on cross-examination, the quality of the experts' presentations, or some other factor that will either be misunderstood or irrelevant. Accordingly, district courts must guard carefully against the risk that unreliable testimony will infect the process.

2. Mercenary Expert Testimony. Other factors unique to expert testimony also increase the risk of abuse. Unlike an ordinary witness,[4] an expert witness may be (and

[4] It is generally a felony to pay a witness for testimony in federal court, *see* 18 U.S.C. § 201(c)(2), or to be paid as a witness,

commonly is) paid to testify. *See, e.g.*, Gross, *supra*, 1991 WIS. L. REV. at 1129-36. This naturally creates a market in expert testimony, meaning that litigants can "shop" for the experts most likely to assist their cases, so that the actual expertise of the witness may become a secondary concern. *See, e.g., In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1234 (CA5 1986) (criticizing "experts whose opinions are available to the highest bidder"); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 553 (Tex. 1995) (noting the existence of "experts who 'are more than willing to proffer opinions of dubious value for the proper fee' ") (quoting 2 S. GOODE, O.G. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 702.2, at 17 (2d ed. 1993)); Gross, *supra*, 1991 WIS. L. REV. at 1131-32 (describing the modern market for expert testimony).

Although an opposing lawyer can bring out on cross-examination that a witness has been paid to testify, this control is not particularly effective because typically both sides will have paid their expert witnesses. The mere fact of payment gives the jury no reason to prefer one paid expert over the other. Accordingly, district courts must guard carefully against the risk that purely mercenary testimony will infect the process.

3. The Expert Witness as a Conduit for Inadmissible Evidence. Unlike ordinary witnesses, expert witnesses

see 18 U.S.C. § 201(c)(3). These general rules do not apply to expert witnesses. *See* 18 U.S.C. § 201(d). *See also, e.g.*, A.B.A. MODEL RULE OF PROFESSIONAL CONDUCT 3.4(b); A.B.A. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(C).

can base their testimony on otherwise inadmissible evidence. *See* FED. R. EVID. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference . . . need not be admissible in evidence."). By definition, the jury should not consider this underlying inadmissible evidence. *Cf., e.g.*, FED. R. EVID. 103(c) ("proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means").

If the system works properly, the expert will "filter" the inadmissible evidence, using his or her expertise implicitly to vouch for the reliable evidence and to eliminate the unreliable from consideration. *See, e.g.*, Advisory Committee's Note to FED. R. EVID. 703; *United States v. Sims*, 514 F.2d 147, 149 (CA9) ("Years of experience teach the expert to separate the wheat from the chaff . . . . "), *cert. denied*, 423 U.S. 845 (1975). When the system works poorly, however, the expert may become little more than a conduit for putting inadmissible evidence before the jury. *Cf. Marsee v. United States Tobacco Co.*, 866 F.2d 319, 322-324 (CA10 1989) (plaintiff's medical expert attempted to introduce inadmissible hearsay); *United States v. Lundy*, 809 F.2d 392, 395 (CA7 1987) ("An arson expert cannot testify that he heard from an informant that the defendant torched the building and thus in his expert opinion the defendant probably set the fire."); *Barris v. Bob's Drag Chutes & Safety Equipment, Inc.*, 685 F.2d 94, 101-102 n.10 (CA3 1982) (plaintiff's design expert attempted to introduce unrelated data and facts from a different expert's report). Accordingly, district courts must guard carefully against the risk that experts will become conduits for inadmissible evidence that will infect the process.

B. The Need for a Robust Gatekeeper Function to Exclude Inappropriate Expert Testimony

Because expert testimony is very different from other testimony, the Federal Rules of Evidence give judges the power to exclude expert testimony on grounds that are unavailable with respect to other witnesses. In other words, the Rules create a unique gatekeeper function for expert testimony that is broader than the normal gatekeeper function that trial judges regularly undertake (on such issues as relevance, for example). *See, e.g., General Electric Co. v. Joiner*, 522 U.S. ___, 118 S. Ct. 512, 517 (1997); *Daubert, supra*, 509 U.S. at 589 & n.7; *Hamling v. United States*, 418 U.S. 87, 108 (1974). But the Rules do not specify whether this is a robust gatekeeper function (in which judges carefully scrutinize expert testimony and keep out anything questionable), a weak one (in which judges admit everything that is arguably relevant and reliable, leaving it to the jury to sort out the good evidence from the bad), or something between these two alternatives.

If judges were to exercise only a weak gatekeeper function, expert testimony would be little different from other evidence. District courts can exclude *any* evidence that is, for example, irrelevant, *see* FED. R. EVID. 402, cumulative, *see* FED. R. EVID. 403, or unduly prejudicial, *see ibid*. The unique gatekeeper function for expert testimony undoubtedly justifies something more than this.

Amici contend that a robust gatekeeper function is required because the unique problems associated with expert testimony, *see supra* part I.A, demand particularly close scrutiny to ensure that unreliable testimony does not infect the trial process.

II

A District Court's Responsibility for Controlling Questionable Expert Testimony Does Not End with the Decision on Admissibility, but Continues During the Remaining Pre-Trial Proceedings, Throughout the Trial, and When Deciding Post-Trial Motions

Although the district court should be a robust gatekeeper to exclude inappropriate expert testimony, controlling the gate is not the only method to control the problem. District courts also have other tools for ensuring that litigants do not misuse questionable expert testimony, and they should be instructed to take advantage of their full arsenal to preserve the integrity of the trial process. Recognition of the full range of options is important even when ruling on admissibility, because it enables the court to tailor its admissibility ruling appropriately.

A. The Inadequacy of the Simple Gatekeeper Model for Controlling Questionable Expert Testimony

Excluding questionable testimony is one way to control the unique problems associated with expert evidence. But a decision to admit expert testimony does not necessarily mean that the evidence is so reliable that no further problems can arise. In reality, no clear line exists between reliable and unreliable expert testimony. Although some

testimony is clearly unreliable and should be excluded, while some is clearly reliable and should be admitted, a district court is least likely to address these extreme situations in practice.[5] Between the two extremes lies the spectrum of cases that generally require a decision.

Often the expert evidence offered will be sufficiently unreliable that the best course, considering all of the circumstances, will be to exclude it completely. Sometimes the evidence offered will be unreliable enough to make the judge skeptical, but not so unreliable that the judge concludes that it should be excluded completely. In such a situation, the judge may wish to admit the evidence, confident in the knowledge that subsequent remedies will still be available to deal with the problems if the judge's initial skepticism proves justified. In short, some evidence that lies at the margin of admissibility may be properly admitted because the court has adequate controls (other than exclusion) available. In these situations, the important concerns that justify a robust gatekeeper function will still be addressed while also recognizing "the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.' " *Daubert, supra,* 509 U.S. at 588 (quoting *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 169 (1988)).

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[5] Clearly inadmissible evidence is the least likely to be offered and clearly admissible evidence is the least likely to be challenged because most parties will recognize the futility of these attempts. *Cf. Daubert,* 509 U.S. at 592 n.11 ("well-established propositions are less likely to be challenged").

Finally, the alternative remedies noted here are particularly important in cases where admissibility is never an issue.[6] As this Court recognized in *Daubert*, some expert testimony is shaky but still admissible. *See* 509 U.S. at 596. In such situations, the trial court's gatekeeper function is not effective, and the court must instead rely on other pre-trial, trial, and post-trial remedies.

B. Alternative Pre-Trial, Trial, and Post-Trial Remedies for Controlling Questionable Expert Testimony

District courts have a wide array of pre-trial, trial, and post-trial remedies for controlling the problems associated with questionable expert testimony, and *amici* note only a few of them here. The important point is not to catalogue the entire range of options, but to recognize that (a) there is a wide range of options; and (b) district courts should use them in appropriate circumstances.

1. Summary Judgment. A district court's conclusion that expert testimony satisfies the Rule 702 standard does not necessarily mean that the case must proceed to trial. If the court concludes that the testimony – although admissible – is still so questionable that it is insufficient to allow a reasonable jury to find in the proponent's favor, "the court remains free . . . to grant summary judgment." *Daubert*, *supra*, 509 U.S. at 596 (citing FED. R.

[6] In some cases, expert testimony may be perfectly reliable but it will still be insufficient to establish all of the elements of a plaintiff's case. In such a situation, the remedies discussed here are particularly relevant.

CIV. P. 56). *See also, e.g., Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349 (CA6) (upholding summary judgment when the plaintiffs' evidence – essentially the same as the expert testimony whose admissibility was at issue in *Daubert* – was insufficient to allow a jury to find that Bendectin caused the relevant birth defects), *cert. denied*, 506 U.S. 826 (1992); *cf. Vadala v. Teledyne Industries, Inc.*, 44 F.3d 36, 39 (CA1 1995) (quoting *Daubert*).

2. Appropriate Jury Instructions. In *Daubert*, this Court explained that "[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 596. Cross examination and contrary evidence are within the control of the opposing party, of course, but the district court is responsible for the "careful instruction on the burden of proof." The burden of proof, however, is not the only issue on which the district court may need to provide appropriate jury instructions. Depending on the context, it may be necessary for the court to give limiting instructions regarding, for example, the uses to which evidence may be put, *see, e.g., Daubert*, *supra*, 509 U.S. at 591 (noting that evidence about the phases of the moon may be valid for one purpose, but not for another purpose); *Sims*, *supra*, 514 F.2d at 149-150 ("[When an expert relies on inadmissible hearsay,] it . . . becomes necessary for the court to instruct the jury that the hearsay evidence is to be considered solely as a basis for the expert opinion and not as substantive evidence."), or the power of the jury to reject expert testimony, *see, e.g.*, Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in*

Civil and Criminal Jury Trials, 154 F.R.D. 537, 555-558 (1994).[7]

3. Judgment as a Matter of Law Before Submission of the Case to the Jury (Directed Verdict). Under Federal Rule of Civil Procedure 50(a), the district court may grant a motion for judgment as a matter of law before submitting the case to the jury if "there is no legally sufficient evidentiary basis for a reasonable jury" to reach a different conclusion. The *Daubert* Court recognized this procedure – known as a "directed verdict" before the 1991 amendments to the Rules – as an appropriate method for dealing with questionable expert testimony:

> [I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment. . . .

509 U.S. at 596 (citing FED. R. CIV. P. 50(a)). *Cf. Vadala v. Teledyne Industries, Inc.*, 44 F.3d 36, 39 (CA1 1995) (quoting *Daubert*).

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[7] Although limiting instructions are important and may be valuable in appropriate situations, they are often inadequate. As this Court has recognized, in some situations limiting instructions are so unlikely to be effective that a trial court would not be justified in relying on them. *See, e.g., Bruton v. United States*, 391 U.S. 123, 135 (1968) ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great . . . that the practical and human limitations of the jury system cannot be ignored."); *cf. Gray v. Maryland*, 523 U.S. ___, 118 S. Ct. 1151, 1155 (1998).

4. Judgment as a Matter of Law After Trial (Judgment Notwithstanding the Verdict). Under Federal Rule of Civil Procedure 50(b), the district court may still grant a motion for judgment as a matter of law after the jury has returned a different verdict. Thus this procedure – known as a "judgment notwithstanding the verdict" or a "judgment n.o.v." before the 1991 amendments to the Rules – would be appropriate when the jury has been unduly swayed by questionable expert testimony but "the scintilla of evidence presented . . . is insufficient," *Daubert, supra*, 509 U.S. at 596.[8] *See, e.g., Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823 (CA DC 1988) (affirming judgment n.o.v.), *cert. denied*, 493 U.S. 882 (1989).

5. Remittitur. When the jury has been unduly swayed by questionable expert testimony in assessing

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[8] There is a conflict among the circuits as to whether a district court, when ruling on a motion for judgment as a matter of law after trial (previously known as "judgment notwithstanding the verdict"), can decline to consider evidence that in retrospect should not have been admitted during trial. *Compare Lightening Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1198-1200 (CA3 1993) (court may exclude improperly admitted evidence from consideration), *with, e.g., Schudel v. General Electric Co.*, 120 F.3d 991, 995-996 (CA9 1997) (court may not exclude improperly admitted evidence from consideration); *Jackson v. Pleasant Grove Health Care Center*, 980 F.2d 692, 695-696 (CA11 1993) (same); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343-44 (CA6 1992) (same). Under either view, however, the district court may enter judgment as a matter of law after trial when the questionable evidence – whether or not it should have been admitted – is insufficient (when considered with the rest of the evidence in the case) to support the verdict. *See, e.g., Douglass*, 956 F.2d at 1345.

damages, a remittitur may be an appropriate remedy.[9] In *Shu-Tao Lin v. McDonnell Douglas Corp.*, 574 F. Supp. 1407 (S.D.N.Y. 1983), for example, the jury was unduly swayed by an "expert" economist's testimony that, in retrospect, should not have been admitted in evidence. The district judge thus offered a remittitur. *See id.* at 1414. Although in this particular case, the defendant succeeded in having even the reduced verdict set aside on appeal, *see Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45 (CA2 1984), the option is nevertheless available in appropriate contexts. *See also, e.g., Strickland v. Owens Corning*, 142 F.3d 353, 357-358 (CA6 1998) (remittitur appropriate when the jury's allocation of fault was against the weight of the evidence).

6. New Trial. When the jury has been unduly swayed by questionable expert testimony – sometimes because the evidence should not have been admitted at trial, but more often because admissible testimony was insufficient to support the verdict – and the court is for some reason unable to enter judgment as a matter of law,[10] ordering a new trial is an appropriate remedy. *See,*

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[9] When the jury has been unduly swayed by questionable expert testimony in determining liability, on the other hand, a remittitur would not be appropriate. When the jury is not justified in holding the defendant liable, *no* damages should be awarded. But when the jury is entitled to find liability and the questionable expert testimony relates only to the amount of damage that the plaintiff suffered, as in *Shu-Tao Lin*, then the district court may consider offering a remittitur.

[10] *See generally, e.g., Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940) (noting how the standard for ordering a new trial differs from the standard for granting judgment as a matter of law).

e.g., Schudel v. General Electric Co., 120 F.3d 991, 996 (CA9 1997); *Jackson v. Pleasant Grove Health Care Center*, 980 F.2d 692, 696 n.4 (CA11 1993); *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 49 (CA2 1984); *see also, e.g.*, FED. R. CIV. P. 50(b)(1)(B), 50(b)(2)(A).

C. The Importance of Pre-Trial, Trial, and Post-Trial Remedies at the Admissibility Stage

In this case, the immediate issue before the Court is the admissibility of an expert witness's proposed testimony, and thus it may seem premature to consider pre-trial, trial, and post-trial remedies. In fact, it is very important to consider these remedies at this stage. Not only are they an important part of the solution to the potential problems created by questionable expert testimony,[11] they are also an important consideration in resolving the admissibility question. The district court should make the admissibility determination with the full range of options in mind. Otherwise, it might exclude evidence that should properly have been admitted because other remedies would have been sufficient to solve the problems it might otherwise create.

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[11] If the district court decides on remand to admit Mr. Carlson's testimony and the original reliability concerns prove justified, it will be important for the court to exercise its trial and post-trial control functions. The court must avoid the mistake of thinking that because the evidence was admitted, no further control with respect to that evidence is available. "[T]he 'liberal thrust' of the Federal Rules," *Daubert, supra*, 509 U.S. at 588 (quoting *Beech Aircraft Corp., supra*, 488 U.S. at 169), does not justify a district court's abandoning all controls over questionable expert testimony – even if it may be admissible.

CONCLUSION

The decision of the Eleventh Circuit should be affirmed, and the case should be remanded to the district court for further consideration in light of the principles suggested here.

Respectfully submitted,

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